86-500

No.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RUSSELL J. LEONARD,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

John C. Cook, and
William Sonnenburg,
Assistant U.S. Attorneys

Russell J. Leonard.
Pre Se

58 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did Petitioner intelligently and knowingly waive his right to counsel at arraignment?

2. Was Defendant in this case compelled or caused to unwittingly enter into a jurisdiction unenforcible at law upon a person of Defendant's status?

3. Did the charge to the jury include instructions which were so clearly erroneous as to likely produce a miscarriage of justice?

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The jurisdiction of the district and circuit courts is strictly statutory and cannot be lawfully extended beyond the limits Congress has specifically granted.

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RUSSELL J. LEONARD,
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v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

OPINION OF THE COURT BELOW

The opinion of the United States Sixth Circuit Court of Appeals in THE UNITED STATES OF AMERICA v. RUSSELL J. LEONARD August 1, 1986, No. 85-5676 is reproduced in the Appendix.

STATEMENT OF JURISDICTION

The opinion of the United States Sixth Circuit Court of Appeals in U.S. v. LEONARD was filed August 1, 1986. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Sect. 1651(a) and 2106 and Rules of the Supreme Court of the United States, Rule 17.1 (a) and (c).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time or War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.":

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by laws, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense."

STATEMENT OF THE CASE

This petition is the result of conviction of Appellant by jury trial in the U.S. District Court for the Eastern District of Tennessee, Southern Division, on three counts of willfully failing to file income tax returns (Sect. 7203 of The Internal Revenue Code). The trial occurred on June 4, 5, and 6, 1985 in Chattanooga, Tennessee. Attorney Donald McPherson represented the defendant (Appellant) and U.S. Attorneys Sonnenberg and Cook represented the government. R. Allan Edger sat as trial judge. John Y. Powers presided as magistrate at arraignment.

The charges were first made by information and arraignment was scheduled for January 11, 1985. At that time Defendant had not obtained counsel and the arraignment was postponed until January 24, 1985. It was again postponed to January 28, 1985 for the defendant to complete arrangements for counsel. On the latter date the highways were impassable because of snow and ice. The arraignment was rescheduled for January 30, 1985 at which time Mr. MacPherson was in a trial in Alaska. This fact was confirmed by telephone by the magistrate. The accused appeared and attempted to determine the nature and cause of the charges against him so that effective defense could be prepared, if necessary. The accused also challenged the jurisdiction of the court to hear that case and

explained to the magistrate that effective challenge could be made only by his counsel. Both the challenge to jurisdiction and demand for counsel were summarily denied by the magistrate.

The government then brought the same three charges by indictment and a third arraignment hearing was held on March 24, 1985. Defense counsel was in trial in New York and the magistrate was aware of his preoccupation. Again Defendant was not able to determine the nature and cause of the charge or prove that there was no probable cause for his arrest or obtain information necessary for defense preparation or effectively challenge the jurisdiction of the court in this case because he was denied the assistance of counsel.

At trial the presiding judge denied Defendant a fair trial by informing the jury, in the charge after all evidence was submitted, as to matters of fact which should have been left for the determination of the jury.

Appeal was made to the 6th Circuit Court of Appeals. Not one contention of Appellant was answered in substance by the circuit court although each was answered superficially. The circuit court affirmed the lower court action in each contention.

ARGUMENT

Where an accused citizen does not knowingly and intelligently waive his right to the assistance of counsel, the right applies at every stage of a criminal proceeding.

The jurisdiction of the district and circuit courts is strictly statutory and cannot be lawfully extended beyond the limits Congress has specifically granted.

The charge by the trial judge to the jury should be truthful and clear enough that jury members unversed

in the technicalities of law can understand the true meaning of the law as given by the judge and to whom it applies.

QUESTION #1

DID PETITIONER INTELLIGENTLY AND KNOWINGLY WAIVE HIS RIGHT TO COUNSEL AT ARRAIGNMENT?

Amendment VI of the United States Constitution specifies the right of the accused to have the assistance of counsel in any criminal prosecution.

During the proceedings in this case at three hearings, referred to as arraignments, the magistrate and the U.S. Attorneys asserted no less than three times that the Defendant had a right to counsel at arraignment. The appellant, no less than eight times, demanded assistance of counsel at arraignment. There is no indication anywhere in any transcript that Defendant waived his right to counsel. The magistrate and the U.S. attorneys knew that defense counsel was involved in litigation in a distant place at the time of arraignment. The attempt by the circuit court to cover up this plain error of the district court by citing from the transcript and alleging the cite constitutes waiver of the right to counsel by Appellant indicates bias against this appellant by the circuit court. The cite is at page 9 of transcript of January 30th arraignment, lines 10 through 13. As is plainly shown, this appellant, instead of waiving his right to counsel, reasserted it by the answer "Yes sir" to the question, "---is that not correct?" In other words --- "Yes sir, that is not correct that I wish to proceed without counsel".

The action by the district court of proceedings

after objection by the defendant because his counsel of choice could not be present was plain error by that court. Neither the court nor the defendant had any control over counsel's ability to be present. The court did not have lawful jurisdiction in the case but the defendant and his counsel were denied the opportunity to pursue this issue when the magistrate summarily overrulled the defendant's challenge to jurisdiction. (P. 6. lines 10-21. 2nd arraignment on information). Regardless of previous rulings by circuit courts regarding jurisdiction of the court. it is not for the judge to anticipate that a challenge cannot have merit and therefore deny Defendant's right to have counsel to address that issue.

Further. the defendant was not informed of the nature and cause of the charges and therefore effective defense could not be prepared. The presence of counsel at arraignment was essential to insure effective preparation of defense strategy.

Three transcripts of arraignments show one aborted on January 11. 1985 and one held on January 30. 1985. These both resulted from charges by information. The circuit court's expressed understanding (P. 3 of opinion) that it was at Appellant's request that this latter exercise was postponed from January 24th to January 30th is not exactly the case. The appellant requested postponement from January 24th. 1985 to January 28. 1985 in order to fly to Phoenix. Arizona to complete arrangements for counsel. The postponement from January 28. 1985 to January 30. 1985 was the result of record breaking snowfall and icy roads. The local counsel. who was to appear on January 30th was dismissed after he admitted that he had no expertise in the legal matters manifest in Appellant's case. The 3rd arraignment was on March 24. 1985 after the same charges were made by indictment. The transcript of

the 3rd arraignment proceedings shows, just as the one on January 30, 1985, that it was never the appelant's intention to waive his right to counsel. As a medical doctor this appellant knew that waiver of counsel in this matter would be the equivalent of agreeing to have his appendix removed by a lawyer. The record is clear that the lower court denied Defendant's repeated demand to have counsel of his choice present at arraignment. This court should reverse the lower court conviction based on its rulings on this matter in the cases cited by this appellant in the appeal to the circuit court or, at a minimum, remand the case to the lower court.

QUESTION #2

WAS DEFENDANT IN THIS CASE COMPELLED OR CAUSED TO UNWITTINGLY ENTER INTO JURISDICTION UNENFORCIBLE AT LAW UPON A PERSON OF DEFENDANT'S STATUS?

Appellant addressed the issue of jurisdiction of the court briefly in the appeal and, with continued research, more thoroughly in a motion to vacate judgment under Title 18 Sect. 2255. After the trial judge failed to timely honor the motion to vacate, in violation of the prompt hearing requirement of Sect. 2255, a Title 18 Sect. 2241 was sent to the district court in Montgomery, Aalbama. The latter court first denied jurisdiction and then refused to consider the Habeas Corpus because the trial judge had not acted on the Sect. 2255 motion. Following the denial of the appeal, the trial judge summarily dismissed the Sect. 2255 motion on the basis that the appeal had been denied.

Although the issue of jurisdiction has been more thoroughly investigated by the appellant, and he has facts and statues to further prove the lack of jurisdiction of the trial court in its proceedings in this case,

the additional material was not heretofore presented to the appellate court.

The 6th circuit court in the case of U.S. v. McMULLEN 785 F 2d 65 (cited by the court which made the ruling) did not address the issue of jurisdiction in substance although that court used that ruling to support its opinion in this case. This Appellant did not contend, as asserted by the circuit court, that the United States could not enforce its lawful tax levies, even through criminal "codes". He does continue to insist, assert and maintain that The Congress can not lawfully make a grant of criminal jurisdiction to the district or circuit courts over persons, territory or subject matter not within the jurisdiction of the United States nor over whom or which the United States has no cognizance. He further continues to assert and maintain that the district court was obligated to address the issue of jurisdiction when it was challenged and that he never knowlingly admitted to the district court's jurisdiction over the territory or the subject matter as related to this Accused Person. Before proceeding, after Appellant's challenge, the district court was obligated to require proof by Plaintiff of territorial, subject matter and in personum jurisdiction. The element of such proof was essential to Defendant's understanding of the nature and cause of the charges against him and to preparation of defense strategy. No evidence was introduced at arraignment or at trial to show that This Appellant was included among the persons to whom Sect. 7203 of the Internal Revenue Code applies or that the alleged "crime" was committed within the territorial jurisdiction of the United States. Furthermore, Appellant believes This Court is aware, and therefore no proof is required, that the Internal Revenue Code is not Title 26 of the United States Code, is not positive law and is not

prima facia evidence of law. This is in contradistinction to the apparent misunderstanding of the 6th circuit court as indicated in the 5th line of the Per curiam in its opinion. The lawful jurisdiction of the United States is narrow and restricted within the state of Tennessee where this Petitioner resides. Appellant believes the burden of proof of jurisdiction of the district court in this case was placed, by his challenge to that jurisdiction, on the plaintiff and that failure of the district court to require such proof constitutes plain error by the court because it denied defendant substantive information as to nature and cause of the charges which was necessary for effective defense preparation. Defendant was, therefore, denied due process of law and for this reason the lower court decision should be reversed.

QUESTION #3

DID THE CHARGE TO THE JURY INCLUDE INSTRUCTIONS WHICH WERE ERRONEOUS AND LIKELY TO PRODUCE A MISCARRIAGE OF JUSTICE?

Appellant believes the circuit court failed to address the substance of his contentions relating to the jury instructions and, instead, gave an opinion based on the erroneous assumption that the cited Internal Revenue Code portions are law which applies to this Petitioner. Three main elements of contention are presented for review by this court. These are that the trial judge made determination of facts, without requiring proof, which should have been left for the jury to decide:

1) with regard to the requirement that this Defendant file tax returns for the years in question;

2) with regard to whether the forms filed were returns within the requirements of the law; and

3) that the gross receipts alleged by Plaintiff to Defendant constituted gross income within the meaning of the law.

With regard to element 1) above - This Appellant contends that his right to judgement of fact by a jury was violated by the trial judge when he made the determination that "the Defendant is a person required to file tax returns if his gross income for the calendar year 1978 exceeded 4,700 dollars, and in 1979 and 1980 his gross income exceeded 5,400 dollars, even though he may be entitled to deductions from that income in a sufficient amount so that no tax will be due." The jury should have been allowed to make a determination of the applicability to the defendant of all other elements, besides an amount of gross income, which might have brought him within a requirement to file tax returns. The amount of gross income is not the sole nor even the most important factor in the determination of the requirement to file tax returns. The status and the location of the person accused are both of predominant significance in establishing a requirement to file tax returns, as defined by the trial judge, that "contains sufficient information from which tax liability can be established". (Paraphrased). Neither U.S. vs. SULLIVAN, 274 U.S. 259 nor GARNER vs. U.S., 424 U.S. 648, nor the Internal Revenue Code nor any statute ever defined a required tax return in this manner. After first properly placing the burden on the plaintiff to prove that the defendant was required to file tax returns, (P. 13 lines 19-25; P. 14 lines 1-13 Charge of the Court), the judge then relieved plaintiff of any proof of requirement to file except an amount of income.

With regard to element 2) above, this appellant contends that the judge's instruction to the jury that "a document which contains no information from

which tax liability can be determined is not a tax return within the meaning of the Internal Revenue Code" is not erroneous in an instruction in the trial of a person required to file the returns specified within the Internal Revenue Code, but that such instruction is definitely plain error in the trial of a person who is not required (compelled) to file such returns. This appellant further contends that he is not a person so required, and that no proof or evidence was presented that he was or is, and that, therefore, this instruction that "a document which contains no information from which tax liability can be calculated does not constitute a tax return within the meaning of the Internal Revenue Code." (P. 16 lines 17-20, Charge of the Court) was prejudicial to the jury and caused the jurors to assume that this defendant was required to file a document from which tax liability could be determined. Such instruction removed the determination of whether such a return was required from the prerogative of the jury and made it a matter of law.

With regard to element 3) Appellant contends that the applicable instruction in a Sect. 7203 Internal Revenue Code prosecution is one which identifies gross income as a profit or gain derived from a source, as identified in Sect. 61A of the Internal Revenue Code, instead of including, in fact, "compensation for services" as defined by the trial judge. (P. 15, lines 15—17, Charge of the Court).

This determination by the judge did not allow the essential fact as to what part of defendant's gross receipts constituted gross income to be determined by the jury. [It is true and the instruction would be correct, if an employee of government (which is divided into military departments, treasury, state, etc.) is on trial, that his wages or compensation for service would be income.].

This court has addressed this issue from time to time saying, "the income tax is an excise tax", BRUSHABER v. UNION PACIFIC R.R., 240 U.S. 1 (1915); "The income tax is a tax on gain or profit", FLINT v. STONE TRACY CO., 220 U.S. 107 (1911); "a tax derived from, not on, the source" (capital), EISNER v. MCCOMBER, 252 U.S. 189 (1919); "Wages, salaries and commission are not income and are not taxable", EDWARDS vs. KEITH 231 F110 (1916) and "Gross income does not include everything that comes in." SO. PACIFIC R.R. CO. vs. LOWE 238 F. 847 (1917).

This court has denied Congress the right to define "income", EISNER v. MCCOMBER, supra; CONNER v. U.S. 303 F. Supp. 1187, 1189 (1969).

From these facts it seems clear to petitioner that Sect. 61A of the Internal Revenue Code, in its definition of gross income as "the gross amount of income from whatever source derived", (the underlined part of the definition being verbatim from the 16th Amendment), that Congress has assumed the Supreme Court's definition of income. This would mean that "gross income", as defined in Sect. 61A of the Internal Revenue Code, would apply to the gross amount of gain or profit and not gross receipts, thus explaining why wages, salaries and commissions are not included in the items that are listed under "gross income". Compensation is listed under the definition of gross income (Sect. 61A Internal Revenue Code) as a source but not as income unless the compensation results from a government granted privilege or from employment by the government. Appellant is not aware of receiving a privilege from government nor is he in government employment. The jury instruction, therefore, that "gross income includes compensation for services, fees--" is erroneous and is in conflict with

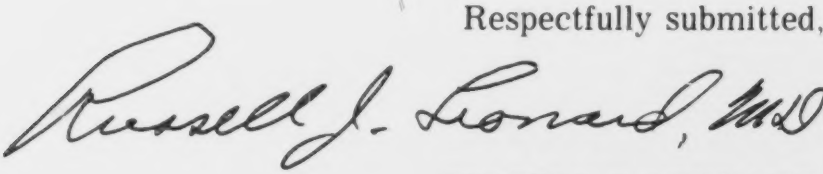
Sect.61A of the Internal Revenue Code. Further, no statute was cited by plaintiff nor can one be found which defines gross income as in the Charge of the Court. This erroneous instruction prejudiced the jury to conclude that all of Defendant's compensation was income when that was not necessarily the truth. The instruction should have allowed the jury to determine whether the Defendant's compensation was income within the meaning of the law.

The petitioner believes the jury instructions, taken as a whole, were designed to, and did, prejudice the jury into conclusions which were not supported by evidence and therefore resulted in a serious miscarriage of justice and asks This Court to reverse the lower court judgment on this ground.

CONCLUSION

For the foregoing reasons, Russell J. Leonard respectfully petitions this court to issue a writ of certiorari to review the judgment and opinion of the United States Sixth Circuit Court of Appeals and redress the errors of the trial court in the instant case.

Respectfully submitted,



RUSSELL J. LEONARD,
Pro Se

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-5676

UNITED STATES OF AMERICA

v.

RUSSELL J. LEONARD

Pierce Slively, Chief Judge
Albert J. Engel
Damon J. Keith
Giles S. Merritt
Cornelia G. Kennedy
Boyce F. Martin, Jr.
Nathaniel R. Jones
Robert B. Krupansky
Harry W. Wellford
H. Ted. Milburn
Ralph B. Guy
David A. Nelson
James L. Ryan
Danny J. Boggs
Alan E. Norris
Leroy Conti

Opinion by
Engel, Conti and Ryan

Filed: August 1, 1986

PER CURIAM. Dr. Russell Leonard, appearing pro se, appeals his conviction on three counts of willful failure to file a tax return for the years 1978, 1979 and 1980, in violation of 26 U.S.C. §7203. Since none of appellant's contentions have merit, we affirm the judgment of the district court.

Dr. Leonard filed tax returns for the years 1974 through 1977, and paid his taxes for those years in full. In 1978, he filed a signed form 1040, but the form revealed nothing about the taxpayer or his taxable income. Specifically, it did not give his address, occupation, social security number, or any income figures. In the spaces provided for numerical entries, Dr. Leonard placed asterisks, which referred the reader to the following statement typed at the bottom of the form: "[t] his means specific objection is made under the 1st, 4th, 8th, 9th, 10th, 13th, 14th and 16th Amendments."

Evidence at trial indicated that Dr. Leonard's income for the tax years 1978, 1979 and 1980 was $71,529, $63,689, and $71,420, respectively. His trial began on June 4, 1985, and the jury returned a guilty verdict on all three counts two days later. He was sentenced to one year imprisonment and a $10,000 fine upon each of counts one and two of the indictment, the sentences to be served consecutively, and three years' probation on the third count, the probation to commence upon his release from confinement.

I.

Dr. Leonard begins with the contention that the district court lacked jurisdiction over this criminal tax prosecution because Congress does not have constitutional authority to create federal court jurisdiction over crimes relating to tax matters. The appellant's argument is so lacking in merit and the law is so clearly to the contrary as to require no discussion of

the point. See United States v. McMullen, 755 F.2d 65, 67 (6th Cir. 1984), cert. denied, 106 S.Ct. 92 (1985).

II.

Dr. Leonard next contends that the judiciary lacks the necessary constitutional "independence" to hear and decide his case. He contends that "the threat of executive branch reprisals against members of the trial court could have caused bias against the defendant in this case." Appellant has presented no evidence whatever to support this claim. Therefore, we consider this claim no further.

III.

Dr. Leonard's third assignment of error is that his arraignment was conducted without the presence of counsel and this violated the right to counsel provision of U.S. Const. amend. VI.

The record shows that at the scheduled arraignment on January 11, 1985, the district court advised Dr. Leonard that he had a right to be represented by counsel and to have the assistance of counsel at the arraignment. Dr. Leonard responded that he desired to be represented by counsel, and stated that he had the necessary funds to retain a lawyer. The court thereupon continued the proceeding until January 24, 1985, to enable appellant to retain counsel. Thereafter, at appellant's request, the proceedings were adjourned for another six days, until January 30, 1985. On that date, appellant appeared for arraignment without counsel. The trial court inquired about appellant's readiness to proceed:

> THE COURT: So, you do not have an attorney present for the arraignment but it is your desire to proceed with the arraignment, is this not correct?
>
> THE APPELLANT: Yes, sir.

We conclude that since Dr. Leonard's arraignment was conducted only after the court granted two continuances so that appellant could make arrangements for the appearance of counsel, and after the court informed Dr. Leonard of his rights and ascertained that he understood them, it was not reversible error for the arraignment to proceed without counsel present. See United States v. Moore, 569 F.2d 1312, 1313, (5th Cir. 1978).

IV.

Appellant's next four claims of error relate to the jury instructions. Since Dr. Leonard's counsel made no objection to the instructions given to the jury, our review is limited to a determination whether the instructions given were plain error. United States v. Warner, 690 F.2d 545 (6th Cir. 1982); Fed. R. Crim. P. 30 & 52(b). "Plain error requires a finding that, taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice." United States v. Piccolo, 723 F.2d 1234 (6th Cir. 1983), cert. denied, 466 U.S. 970 (1984). We are satisfied that none of the jury instruction errors alleged by Dr. Leonard amount to plain error.

A

First, Dr. Leonard contends the district court "invaded the province of the jury" in its instruction on what constitutes a tax return under 26 U.S.C. § 7203. The tax return filed for the 1978 tax year contained no information except appellant's signature, and his assertion that furnishing income information would violate several of his constitutional rights. In order to convict appellant of willful failure to file a tax return under § 7203, the United States was obligated to prove that Dr. Leonard was required to file a return, that he did not file, and that the failure to file was willful. On the issue of whether Dr. Leonard filed a return, the

trial court instructed the jury that:

> A document which contains no information from which tax liability can be calculated does not constitute a tax return within the meaning of the Internal Revenue Code.

Dr. Leonard contends that this instruction compelled the jury to decide that he had failed to file a tax return. In United States v. Goetz, 746 F.2d 705 (11th Cir. 1984), the trial court concluded that, as a matter of law, the document filed was not a return. The Court of Appeals held: "In doing so, the lower court applied the facts to the law, thus invading the province of the jury." Id. at 708. However, the trial judge in this case did not make such a determination. He carefully stated the law and left it to the jury to determine whether the document filed by apppellant was indeed one "which contains no information from which tax liability [could] be calculated," and to apply the facts as they found them to the law as given to them. United States v. Heise, 709 F.2d 449, 451 (6th Cir.), cert. denied, 464 U.S. 918 (1983). Although it was not a difficult application for the jury to make, the district judge did not invade the jury's fact finding prerogative.

B

Dr. Leonard's second judgment relating to the jury instructions is that the instruction concerning when a tax return must be filed improperly assigned the burden of proof to him. The district court instructed the jury that:

> The defendant is a person required to file a return if his gross income for the calendar year 1978 exceeded 4,700 dollars, and in 1979 and 1980 his gross income exceeded 5,400 dollars, even though he may be entitled to deductions

> from that income in a sufficient amount so that no tax will be due.

Rather than "shifting the burden" of proof to the appellant, the court simply stated the applicable law. The jury was left to apply the law to the facts as they found them from the evidence presented at trial. Accordingly, there was no error.

C

Appellant claims the district court's instruction on the willfulness requirement of § 7203 was plain error. If Dr. Leonard had a good faith belief that the return he filed complied with the law, he could not be convicted of willful failure to file an income tax return. See Battjes v. United States, 172 F.2d 1, 4 (6th Cir. 1949), in which the court held that a bonafide misconception of the law is defense to a charge of willful tax evasion. Here, the district court instructed the jury that:

> If a person in good faith believes that he has done all that the law requires, he cannot be guilty of the criminal intent to willfully fail--willfully faiul to file a tax return. But if a person acts without reasonable ground for belief that his conduct is lawful, it is for the jury to decide whether he acted in good faith or whether he willfully intended to fail to file a tax return.

This instruction advised the jury that if they found that Dr. Leonard had a good faith, although perhaps unreasonable, belief that his conduct compiled with the law, they must find him not guilty. There was no plain error in the instruction.

D

Dr. Leonard complains that the jury instructions failed to advise the jury how he could lawfully have asserted his fifth amendment right against

self-incrimination. The essence of the argument is that the following portion of the instruction was in error:

> A person may legitimately claim the Fifth Amendment privilege against self-incrimination only when, at the time of the claim of the privilege, that person is personally confronted by substantial and real, and no merely trifling or imaginery, hazards of incrimination.

The instruction is a correct statement of the law. See Zicarelli v. Commission of Investigation, 406 U.S. 472, 478 (1972). The court was not required to address the matter further.

V.

Dr. Leonard next contends that Fed. R. Evid. 403 required exclusion from evidence of the 1978 income tax form 1040 completed by an accountant on his behalf but never filed with the IRS. The accountant testified that at the time he gave Dr. Leonard the completed return, which indicated a tax liability of some $19,000 for 1978, Dr. Leonard stated, "I don't believe I'll file the goddamn thing." Appellant argues that, under Rule 403, it was prejudicial error for the district judge to receive the 1978 form in evidence. Fed. R. Evid. 403 provides that otherwise "relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." (Emphasis added.)

The document, considered together with the statement by Dr. Leonard, was significantly probative of appellant's state of mind, specifically the willfulness of his failure to file the 1978 tax return, a critical issue at trial and an element of the offense the government was required to prove. The probative value of the document outweighed the danger, if any, of unfair prejudice. The district judge properly received the evidence.

VI.

Finally, Dr. Leonard claims the sentence imposed amounts to cruel punishment, and that the fine is excessive. We disagree.

The sentence of one year imprisonment and a $10,000 fine upon each of two counts, and three years probation for the third count, is within that authorized by 26 U.S.C. § 7203, which provides that individuals guilty of willful failure to file a tax return "shall be fined not more than $25,000 . . . or imprisoned not more than 1 year, or both, together with the costs of prosecution."

"Punishment is not 'cruel and unusual,' unless it is so greatly disproportionate to the offence committed as to be completely arbitrary and shocking to the sense of justice." Kasper v. Brittain, 245 F.2d 92, 96 (6th Cir.) (citing United States v. Weems, 217 U.S. 349 (1910)), cert. denied, 355 U.S. 834 (1957). Dr. Leonard's sentence is not arbitrary nor is it shocking to the sense of justice and, therefore, his claim of cruel punishment is meritless; neither is the fine imposed excessive. In Coker v. Georgia, 433 U.S. 584, 592 (1977), the Supreme Court stated that

> a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.

The fine imposed in this case offends neither of the foregoing criteria and is not excessive.

For all of the foregoing reasons, the judgment of the district court is affirmed.

ISSUED AS MANDATE: 8/25/86
COST: none

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

ELEVENTH CIRCUIT COURT OF APPEALS
SUPREME COURT OF THE UNITED STATES

RUSSELL J. LEONARD
Petitioner, in propria persona

v.

T. R. KINDT
Warden, Maxwell Federal Prison Camp

Petitioon for Writ
of Habeas Corpus

Filed: March 25, 1986

TO: ANY COURT OF COMPETENT JURISDICTION TO ADDRESS THIS PETITION [Sent to: U.S. District Court, Middle District of Alabama/Montgomery, Alabama; U.S. Court of Appeals for the 11th Circuit/Atlanta, Georgia; U.S. Supreme Court/Washington, D.C.] COMES NOW RUSSELL J. LEONARD, IN PROPRIA PERSONA, and petitions This Court to order his release because he is being held in custody in absence of the due process of law required to justify his incarceration, detention, and denial of liberty.

STATEMENT OF THE CASE

PETITIONER LEONARD WAS FOUND GUILTY of three counts of willful failure to file federal income tax returns, supply information, keep records or pay tax allegedly under authority of Title 26 USC Sect. 7203. Petitioner challenged validity of the charge and the jurisdiction of the district court at arraignment and at trial and objected to proceeding at arraignment

without assistance of counsel. Later he petitioned for stay pending appeal and release pending appeal of his 2 year incarceration—3 year probation—$20,000 fine—sentence.

Now, after timely appeal to the 6th Circuit and motion to trial court to vacate judgement under 28 USC Sect. 2255 he petitions This Court to require an immediate inquiry into his continued incarceration in view of the violations of right and due process involved in his prosecution and conviction. The appeal and the post trial motions for stay and release show substantive issues of law on which the motions should have been granted. The motion to the trial court to vacate judgement, after completion of filing appeal, likewise shows Petitioner is being held unlawfully. This latter motion has been in receipt of the trial court for over 14 days without response to Petitioner. The violation of law and individual rights involved are too clearly defined to escape recognition by the trial court and still Petitioner has not been released nor has a hearing been set.

The basic issues involved are shown in the attached copy of Petitioner's motion to the trial court to vacate judgement. Additional issues are addressed in the appellate motion and brief and all indicate a deliberate, systematic and intentional attempt to curtail, narrow and fetter Petitioner's constitutionally guaranteed inalienable rights which he has not knowingly waived and has beligerently claimed in person throughout these proceedings. Now Petitioner is suffering the inconvenience, humiliation, mental anguish, physical discomfort and financial loss resulting from his unlawful incarceration in disregard and violation of his inalienable right to liberty and pursuit of happiness. This incarceration resulted directly from denial of the fundamental right to effective assistance of

counsel and plain error by the trial court as shown in the attached motion to vacate judgement.

The interest of justice demands immediate release and exoneration of this Petitioner who is presently incarcerated for asserting and exercising rights guaranteed by the U.S. Constitution and explicitly recognized and upheld by the U.S. Supreme Court.

This, the 21st day of March, 1986.

Respectfully submitted,
Russell J. Leonard, M.D.
1009-074, Dorm D
Federal Prison Camp
Maxwell AFB, Alabama 36112

P.O. Box 117
Sewanee
Tennessee 37375

MEMORANDUM OF LAW

(Addendum to Petition for
Writ of Habeas Corpus)

A Partial Statutory History of Jurisdiction Granted to Federal District Court

Federal courts, exclusive of the Supreme Court, depend for their origin, jurisdiction and authority on congressional legislation. The Congress has authority under Article I of the Constitution to establish tribunals inferior to the Supreme Court. The Supreme Court is co-equal with The Congress in its power and authority and is lawfully subject to congressional influence only through the process of impeachment. We will here address only the jurisdiction of the inferior tribunals which Congress is given the power to establish and control, and we will limit the instant consideration to the issue of criminal jurisdiction. This memorandum addresses only the statutory considerations leading up to the present Title 18 USC criminal jurisdictional grant. No consideration is here given to case history, which will be necessary for a complete understanding and determination of the extent of lawful criminal jurisdiction of the district courts.

At I Stat. 75 we find the first conferral of jurisdiction over criminal acts by The Congress to the inferior courts. In Sect. 9, 1 Stat. 76, 77 jurisdiction was provided as follows:

"And be it further enacted that the district courts shall have, exclusively of the courts of the several states, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, committed within their respective districts -----."

And at Sect. 11, 1 Stat. 78, 79, The Congress further granted jurisdiction for the circuit courts in criminal

matters as follows:
"and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, (a) except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein."

In first establishing inferior tribunals The Congress, then, gave criminal jurisdiction to those inferior courts over all crimes and offenses cognizable under the authority of the United States.

With no further statutory treatment by Congress it could be argued that this original jurisdictional grant would be effective for any act or ommission made criminal by act of Congress. This premise, however, would require tempering by the courts as to whether the criminal sanctions imposed were within constitutional limitations of The Congress.

It appears to be unnecessary to address that issue with regard to this first grant of criminal jurisdiction because The Congress itself imposed an impediment with regard to matters of taxation in 1815, when at 3 Stat. 244 Chapt. 101 it recognized concurrent jurisdiction of state and county courts with the federal courts in regard to direct taxation. While no specific reference to criminal matters involved in taxation is mentioned in the statute and it appears the statute has been repealed, it is interesting and possibly significant that The Congress might have recognized a lack of authority of the United States, because of constitutional limitations, in regard to the taxing power authorized.

The next chronological grant of jurisdiction over criminal matters seems to be in Sect. 3, 5 Stat. 517 of Aug. 23, 1842 where the district courts were granted concurrent jurisdiction with the circuit courts of all

crimes and offenses against the United States, the punishment of which was not capital. In 1871 The Congress addressed liability of officials employed upon steamboats relative to the killing of a person thereon and granted jurisdiction of the matter to the circuit courts. This was at Sect. 57 of 16 Stat. 456.

The revision and reprinting of the U.S. Statutes in 1872 and 1873 resulted in deletions of repealed acts and the publishing in one volume of current acts in effect. Title 14 of the revision concerned the judiciary. In Sect. 34 Chapter 3 of Title 14 the jurisdiction of the district court concerning criminal matters was specified as follows: "The district courts shall have jurisdiction as follows:

1. of all crimes and offenses cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital."

The revision notes indicate the source for this section as the above grants at 1 Stat. 76 and 3 Stat. 245. The Revised Statutes of 1878 at Chapt. 3 of Title 13, Sect. 563 shows this essentially identical wording carried over into this later revision.

In 1909 the Congress passed, "an act to codify, revise and amend the Penal Laws of the United States:; 35 Stat. 1088, Chapt. 321, the first wholesale revision of the entire criminal statutes. In Sect. 340 of the act, 35 Stat. 1153, the criminal jurisdiction of the U.S. district courts was granted as follows:

"The crimes and offenses defined in this title shall be cognizable in the circuit and district courts of the United States, as prescribed in sections 563 and 629 of the revised statutes".

This reference was to Sect. 563 of the revised statutes of 1878 as shown above. Immediately following Sect. 340 above was Sect. 341, 35 Stat. 1159 which

reads:

"Also all other sections and parts of the Revised Statues and Acts and parts of Acts of Congress, in so far as they are embraced within and superceded by this Act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this Act had not been passed."

By this revision the criminal laws of the United States were put into one title, all previous acts of Congress concerning this matter were repealed, and the act made specially a grant of criminal jurisdiction to the district courts over the crimes and offenses defined in that title.

Almost two years later, in 1911, The Congress codified, revised and amended the statutes relating to the judiciary. This act, 36 Stat. 1807, Chapt. 231, at page 1091 specified jurisdiction of the federal district courts as follows:

"The district courts shall have original jurisdiction as follows:

1) -----

2) Second. Of all crimes and offenses cognizable under the authority of the United States."

The act concluded with repealing provisions similar to that in 35 Stat. 1159 above.

By the end of 1911, it can be seen from the foregoing, Congress had in effect two laws with regard to criminal jurisdiction of U.S. district courts. One was the special grant over crimes and offenses set forth in the criminal code. The other, at 36 Stat. 1087, 1091, was a general grant over any crime or offense which The Congress, at any later time, might legislate.

It appears fundamental in jurisprudence in the United States of America that a grant of jurisdiction

over criminal issues be specifically made. Therefore it would appear that the general grant in 36 Stat. recognized only the special grant at 35 Stat. or any other statute defining a crime, a penalty and a jurisdictional grant. This premise is supported, for example, by 48 Stat. 783, Chapt. 304, where certain acts dealing with robbery of banks under the Fedeal Reserve System are made federal crimes. Concurrent jurisdiction by federal and state courts is implied.

In 1948 both Titles 18, the criminal code, and Title 28, the judicial code, were revised. Prior to these revisions the two titles granted jurisdiction in criminal matters as follows:

18 USC S. 546

"The crimes and offenses defined in this title shall be cognizable in the district courts of the United States, as prescribed in section 41 of Title 28." [underlining denotes a change from statute]

18 USC S. 547

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof".

28 USC Sect. 41

"[judicial code, Sct. 24] original jurisdiction.

The district courts shall have original jurisdiction as follows:

1) -----

2) Crimes and offenses.

Second. Of all crimes and offenses cognizable under the authority of the United States. [Mar. 3, 1911 Ch. 2331 Sect 214, Par. 2, 36 Stat. 1091.]'

28 USC Sect. 371 "[Judicial code, Sect. 256] Exclusive Jurisdiction of United States courts.

The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states:

First of all crimes and offenses cognizable under the authority of the United States....."

Both sections 41 and 371 appear to be jurisdictional grants over "crimes and offenses cognizable under the authority of the United States". Closer examination, however, reveals that S. 371 was simply the corollary in Title 28 to Sect. 547 in Title 18; that is, the distinguishing jurisdictional grant between state and federal courts. Section 41 retained in substance, as identified in the revisor's notes, the jurisdictional grant over all crimes and offenses cognizable under the authority of the United States.

To be cognizable under the authority of the United States federal jurisdiction over the person, subject matter and the territory would be necessary before any court could hear a case. Under personum jurisdiction the person affected would, of necessity, have entered into some contract or agreement with the United States or have damaged or threatened damage to federal persons or property. Under the subject matter, the court would, of necessity, have cognizance solely in instances in which no constitutional limitations or disabilities exist. Under territorial considerations The Congress is not authorized to grant jurisdiction beyond constitutional limitations extending only to the seat of government, forts, docks and other federal holdings. No specific jurisdictional grant has attempted to go beyond these territorial limitations.

It is interesting that the revision of Title 18 USC was followed on the same day by a revision of Title 28 USC. The provision of Title 28 Sect. 41, preserved by the revision of Title 18 was, itself, deleted on the same day that it was preserved. The result was that as of this date 18 USC Sect. 3231, formed by combining Sections 546 and 547 of the older Title 18 with Section 588D of Title 12 and preserving the substance of those

Sections [which included Section 41 of Title 28], now appears to make a general grant of criminal jurisdiction to federal district courts unless the history of that section is studied. The revised version of Title 28 USC, adopted almost simultaneously with the revised Title 18 USC, does not make any reference to jurisdiction over criminal matters in federal courts. There is, therefore, a question relating to the jurisdiction of the district court, in any criminal charge not defined in Title 18 USC.

This issue was further clouded in 1981 when the U.S. Senate proposed a reform of Title 18 USC. Senate Committee report 97-307 recognized certain disabilities of Title 18 USC specifically regarding non-Title 18 crimes. This report is reminiscent of the House and Senate reports and remarks made during the 1948 revision of Title 18. The same issue was recognized and considered but certain acts defined as crimes were intentionally left out of Title 18, the criminal code. It appears that in both instances The Congress recognized its disability involving general criminal provisions because of constitutional limitations. The 1981 Senate proposal was rejected in the Senate.

MEMORANDUM OF LAW
EXTENSION OF GROUNDS IN MOTION FOR
COURT
TO VACATE JUDGMENT CR 1-84-57

12.

A. GROUND ONE DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL AT ARRAIGNMENT

Petitioner was denied effective assistance of counsel at arraignment. His challenge to the jurisdiction of this court could only have been perfected by counsel capable of performing the necessary research in the limited time available. This issue is addressed in some detail in this motion. The court was aware that Petitioner's selected counsel could not be present and that the issue of jurisdiction was being raised. It was only at arraignment that this issue could have been effectively presented and at no time did Petitioner waive his right to assistance of counsel. No attempt was made to help Petitioner understand the nature and cause of the charges against him. Counsel could have addressed this issue in the proper manner to obtain information and understanding necessary for effective preparation of defense if the jurisdiction of the court, in this case, could have been proved. There were significant matters of constitutional safeguards concerning testimony before the grand jury which could have been effectively advanced only by counsel at arraignment. These include, but are not limited to, issues being addressed under the judges charge to the jury in this motion. The court's denial of Petitioner's repeated demand to have assistance of counsel deprived him of a right guaranteed in the U.S. Con-

stitution and may well have caused his subsequent conviction and loss of liberty and property.

B. GROUND TWO LACK OF JURISDICTION OF THE COURT

The district court did not have lawful authority to proceed at arraignment or at trial in the face of Petitioner's challenge to jurisdiction without some form of substantive hearing on the issues and a ruling based on evidence. The district court did not have jurisdiction over the person or the subject matter in this case. The history of congressional action in the granting of jurisdiction over Title 26 USC crimes [the subject here] shows that great care has been exercised to avoid the obvious constitutional conflict which would result from any statutory provision intended to compel individual action which would require waiver of any constitutional rights. This care is demonstrated in the codification and revision of Title 18 USC In 1946-1948. The intent in this action was to bring all crimes and offenses against the laws of the United States into the criminal code, where possible, and without change in substance of the statutes and codes under consideration. It is necessary, therefore, to look to the substance of the statutes and codes under review as they existed before 1947. Title 18, prior to the revision, made a special grant of jurisdiction to the district courts over all crimes "in this title" as prescribed at 28 USC Sect. 41. This is found at 18 USC Sect. 546. The applicable provision of Title 28 referred to was as follows:

> Sect. 41 [Judicial Code Sect. 24] Original jurisdiction.
>
> The district courts shall have original jurisdiction as follows:

1| -----
2| Crimes and offenses
Second. Of all crimes and offenses cognizable under the authority of the United States. Mar. 3. 1911. Ch. 231 Sect. 24. Par. 2. 36 Stat. 1091.|

The specified intent of The Congress in the codification and revision. being to do so without change in substance. would be that criminal jurisdiction be granted the district courts over "all crimes and offenses cognizable under the authority of the United States". The resulting revision is Sect. 3231 of the present Title 18. As recorded in the revision notes this was formed by combining Section 546 and 547 of Title 18 with Section 588d of Title 12 with no change of substance. The words "in this title" were deleted but the substance was preserved. that is. the grant of jurisdiction was specially made to crimes specified in Title 18. That particular jurisdictional grant contained in revised Title 18. therefore. was not intended to extend the crimes enumerated in other titles. The jurisdictional grant for crimes enumerated in other titles was dependent on the preserved substance of Title 28 USC Sect. 41 | 2| |above|. This title 28 grant extending to crimes "cognizable under the authority of the United States" would reach the persons and subject matter involving the criminal provisions enumerated in Chapter 75 of Title 26 USC but could not be extended by judicial construction to encompass persons and subject matter not cognizable under the authority of the United States by virtue of constitutional disabilities. Therefore any person who has. and claims. the individual rights enumerated in the Constitution could not lawfully be forcibly included within the criminal prosecution involving compelled testi-

mony or evidence. The persons specifically included in chapter 75 of Title 26 at Sect. 7343 who are subject to those criminal provisions would be providing information concerning corporations, associations or organizations; none of which has the rights of individuals which are enumerated in the Constitution. Jurisdiction of the court, in this case, would have been dependent on proof that this defendant was a person included within the provisions of that Chapter 75.

Title 28 USC has now been revised and makes no reference to criminal jurisdiction in any cases. Since, however, the intent of the earlier provision in Title 28 was preserved in the 1947 revision of Title 18 it may be assumed that jurisdiction still attaches to "crimes cognizable under the authority of the United States".

It must be expressly noted that during the exhaustive and exacting revision of Title 18 in 1946-1948 specific consideration was given to penal provisions relating to taxation. This is shown in a report included in the Congressional Record Appendix, January 16, 1946 [92 Congressional Record A60-A62] by representative Keogh of New York relating to H. R. 2200, a predecessor bill to H. R. 319, 80th Congress, the final bill. No changes were made in the final bill from the version discussed in this portion of the report. The specific comment is recorded as "whenever feasible, H. R. 2200 has transferred those penal provisions [relating to taxation and national banks] from the other titles, so that the new law will contain all penal provisions as far as possible". [Parenthetical expression added to reflect reference in preceeding sentence; emphasis added] Although no specific reference is made to reasons why it was not feasible or possible to include Title 26 criminal provisions into Title 18 it is not unreasonable to conclude that it was

because of the foregoing constitutonal disability. Whatever the reasons but assuming that the jurisdictional grant over Title 26 crimes continued to the present as that under 28 USC Sect. 41 | 2| of 1946: that is. over all offenses "cognizable under the authority of the United States": it would have been necessary. before assuming jurisdiction in this case. for a determination to have been made by a court competent to examine and determine who and what are within the constutional limitations reached [or encompassed| The summary judgement of the district court in assuming jurisdiction. over Defendant's objections. without any form of judicial process in proving jurisdiction or providing any document or tangible objects material to preparation of defense was in violation of F.R. Crim.P. Rule 16 | a | |1| | c | and 16 | c | and of Defendant's right to substantive due process of law. The challenge to jurisdiction could effectively have been pursued only with the effective assistance of counsel before trial. which was denied by the district court at arraignment with full knowledge that Defendant's counsel was unable to be present or prepare substantive briefs. This denial of effective assistance of counsel further jeopardized defendant's pretrial defense and objections under Rule 12 |f|. F.R.Crim.P by soliciting or attempting to solicit. Defendant's waiver of constitutional rights at arraignment by not being able to effectively raise this and other defenses and objections and make pretrial requests necessary to his defense.

Copies of some of the documents in support of the foregoing contentions are included for convenience of the court.

In the interest of justice this court should vacate its judgement because of the violations of Petitioner's constitutional rights at critical stages of his prosecu-

tion as shown in this motion.

C. GROUND THREE DENIAL OF RIGHT TO HAVE FACTS, AS TO THE REQUIREMENT TO FILE, DETERMINED BY THE JURY

Defendant was not confronted by witnesses who testified as to a requirement for him to supply information on a tax return. The judge summarily ruled that a document which contains no information from which tax liability can be determined is not a tax return within the meaning of the Internal Revenue Code. Such a ruling, in this case, involving a natural individual person, without adequate distinguishing instruction could only have left the jury with the understanding that this Defendant was under the same obligation to file returns containing information as persons who have no lawful claim to the right against compelled self-witness [corporations, organization, associations, etc.] This instruction was contradictory to the Supreme Court's recognition that information is not a necessary element of a document for it to be a tax return within the meaning of the law. This instruction, in view of the returns filed, removed from the jury's determination other essential facts relating to whether the documents filed were returns within constitutional considerations.

D. GROUND FOUR DENIAL OF RIGHT TO HAVE FACTS AS TO WHETHER A RETURN WAS FILED, DETERMINED BY THE JURY

Defendant was not confronted by witnesses who testified that he was a person required to file the tax returns at issue. One consideration involved in creat-

ing such requirement, an amount of income, was presented by prosecution witnesses. Other considerations necessary to establish such requirement were not addressed.

In testimony concerning the amount of income and the amount of tax owed no proof or testimony was presented to show that all the fruit of Defendant's labor constituted income to him. Gross receipts, however, were presented as gross income. Gross receipts is not synonymous with gross income. Defendant's private financial information revealed by the government witnesses during trial, was placed in evidence as gross income over objection. The items shown reflected gross receipts and no evidence was presented that all of it constituted income.

The conditions prerequisite to Defendant's requirement to file tax returns, other than amounts of gross income, were not presented by the government. The judge removed such facts from consideration and determination by the jury when he declared that Defendant was a person required to file if his gross income exceeded certain amounts for certain years. This was in violation of the principle that the facts are to be determined by the jury and thus denied Defendant a fair trial.

E. GROUND FIVE WILLFULLNESS

The Judge's instructions regarding willfulness might have been considered adequate to persons familiar with Supreme Court rulings regarding individual rights in the filing of tax returns. In this case, however, involving instruction to 12 people, whose first knowledge relating to individual rights with respect to such filing may well have been during this trial, the instructions were biased heavily in favor of the plaintiff's position. During jury voir dire the U.S.

Attorney attempted to insure that the members of the jury had no knowledge concerning this matter and even made it appear that peaceful assembly to gain such knowledge ["patriot meetings"] might violate some law.

The implication throughout these instructions is that returns were not filed. This is in sharp contrast to the Supreme Court assertion that the right against self-witness must be claimed on the return itself. That Court has recognized that a document such as Defendant filed is a return. The trial judge's instruction that, "if a person in good faith believes that he has done all that the law requires, he cannot be guilty of the criminal intent to willfully fail to file a tax return", together with some instruction as to what the law requires of an individual natural person in the filing of a tax return, would have fairly instructed the jury. But to follow the above quote with the instruction that, "But if a person acts without reasonable ground for belief that his conduct is lawful--,", leaves the issue of law as to what constitutes "reasonable ground" for the jury to decide. What constitutes a reasonable ground for one person may be entirely different from another's view. From Defendant's view the Supreme Court had told him exactly what he must do to not waive his rights. He must claim the right on the return itself, which he did. By the judge's instruction, then, he could not be guilty of the charges. As a matter of law he should have been exonerated.

The judge's instruction that "you are instructed that the statutory requirement to file an income tax return does not violate the taxpayer's right against self-incrimination," contained no distinguishing identification between a natural person who has such right and a corporate person devoid of that right. The instruction, if related to a corporate entity as a

taxpayer, is true; relating to a private individual, as in this case, would require qualification and combined with the instruction that, "a document which contains no information from which tax liability can be calculated does not constitute a tax return within the meaning off the Internal Revenue Code", gave no recognition to this defendant's right under the Fifth Amendment and implied that he had none with respect to the filing of a tax return.

The positive assertions in the instructions that only if supplying the information on tax returns "will" or "would" subject the defendant to incrimination left the burden of proof on the Defendant that he was criminally implicated or culpable in order to prove his right to the claim against self-witness. Defendant was not in a position to know what information he might furnish could or would be used in criminal action against him. He asserted his firmly held belief that an attempt was in process to acquire data and information to use against him in criminal prosecution.

Taken collectively the instructions did not leave a possibility for the jury to acquit without an admission of criminal involvement by Defendant. The instruction, "that you are not to make any inference of guilt on the part of the Defendant from the fact that he asserted his Fifth Amendment rights-----", coupled with the instruction that the right may be claimed" ---only when, -----that person is personally confronted by substantial and real, --- hazards of incrimination.", required a finding of criminal culpability in order for the jury to acquit. This violates the principle that the right is to protect the innocent and denied Defendant's right to an assumption of innocence by the trial court.

The instruction that "The mere unsupported assertion of a Fifth Amendment privilege, without some additional explanation, -----." implies that there was no

supporting additional information on which Defendant had based his claim. To be fair, the instruction should have 1] given recognition to the supporting information attached to Defendant's tax returns and 2] included some guidelines on which the jury could assess the validity of the timely asserted claim. This implication and absence of recognition and guidelines denied Defendant his right to fairness in the instructions which is necessary for a fair trial.

Taken as a whole, the instructions on willfullness were biased in Plaintiff's favor, especially when viewed from the perspective of jurors unfamiliar with the Sullivan and Garner decisions, and prejudiced the jury heavily against Defendant's position.

CONCLUSION

Based on the testimony and evidence in this motion the Petitioner moves this Court to vacate judgement and exonerate the Petitioner in the interest of justice.

Respectfully submitted this, the ----- day of ----------, 1986.

Certified Mail
163 042 383

Postmarked
March 4. 1986

RUSSELL J. LEONARD
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Sewanee, Tn. 37375

LIST OF EXHIBITS
Included with Memorandum of Law
as Extension of Grounds in Motion 2255
to Vacate Judgment

1) Legislative History of Title 18 revision in 1946-1948

2) 2 pages from Title 18 USC Current Edition, Sect. 3231-3227

3) Cover and 1 page Title 18 USC 1946 Edition, Sect. 546

4) Cover and 4 pages Title 28 USC 1946 Edition, Sect. 41-371

5) Cover and 3 pages Title 18 USC 1948 Edition, Table of Contents

6) Cover and 1 page Title 12 USC 1946 Edition, Sect. 588d

7) 2 pages from Title 28 USC Current Edition, Chapter 85 Sect. 1331-1335

8) 3 pages Legislative History - Counsel Zinn Remarks regarding H.R. 2200, 79th Congress
92 Congressional Record A60-A62

ARRAIGNMENT QUOTES

ARRAIGNMENT, Friday, January 11, 1985

Page 7

MR. COOK: He would be entitled to an attorney at an arraignment after having been given reasonable time to employ an attorney.

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THE COURT:

"----------that you have a right to have an attorney present.----"

THE COURT: "--------- Now, as Mr. Cook very correctly points out, you are certainly entitled to have an attorney present at your arraignment-----"

ARRAIGNMENT, Wednesday, January 30, 1985

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THE COURT:

"----------are you ready to proceed at this time with the arraignment?

DR. LEONARD: Well, I guess I am --

THE COURT: All right, sir.

DR. LEONARD: --forced to.

ARRAIGNMENT, March 28, 1985

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And it is not my understanding that I am going to waive counsel, he is my counsel.

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I will ask you at this time if you are desirous of waiving having your attorney present at this arraignment?

DEFENDANT LEONARD: Not -- I don't quite understand the whole situation. I don't believe that, that I want to go through with the arraignment at this time.

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"-----and I feel that I do have a right to have counsel at arraignment."

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DEFENDANT LEONARD: I have not waived counsel, Your Honor, and what's more, he is -- he has no way of being able to be here. He is in the middle of a court case at this time in New York City, which I think everybody here is conscious of.

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DEFENDANT LEONARD: Your honor, if I had an attorney here, he could advise me.

DEFENDANT LEONARD: But my attorney could

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not be here and, therefore, I am unable to do that.

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DEFENDANT LEONARD: Only that, when I can have the attorney at my side, I certainly wish to have him carry on, but when he is -- has to be elsewhere and, we haven't had time to really work up the case, ---